No. 84-67

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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JAMES L. LINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should the trial court prior to ruling on the applicability of the attorney-client privilege and/or the work product doctrine be required to determine if the Government had already improperly breached the attorney-client privilge and/or the work product doctrine?

2. Should the trial court require more than an affidavit replete with hearsay and other inadmissible evidence in determining that the attorney-client privilege and the work product doctrine was not applicable?

3. The determination of the trial court as to the application of the doctrine of waiver was contrary to existing law.

4. The determination of the trial court as to the application of the doctrine of criminality was contrary to existing law.

5. The trial court should be required to make a factual determination as to the Petitioner when reaching a determination that the attorney-client privilege and the work product doctrine were not applicable.

6. When there are multiple clients involved the trial court should be required to make a preliminary determination as to whether or not the attorney involved has an independent recollection of conversations that he had with the Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, JAMES L. LINDER, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 23, 1984, and as to which a Petition for Rehearing and Suggestion for Hearing En Banc was denied on June 21, 1984.

OPINION BELOW

On May 23, 1984, the United States Court of Appeals for the Ninth Circuit filed an opinion affirming the Order of a United States District Judge requiring an attorney for the Petitioner to appear before a Federal Grand Jury, testify and produce documents. A copy of the Opinion is attached as Appendix "A".

A timely Petition for Rehearing and Suggestion for Hearing En Banc was filed on June 1, 1984. It was denied on June 21, 1984. A copy of the Order is attached as Appendix "B".

A Motion to Stay the Mandate was filed on June 27, 1984.

JURISDICTION

The Court of Appeals affirmed an Order recognizing an attorney for the petitioner to appear before a Federal Grand Jury, testify and produce documents, and a subsequent finding of contempt of the attorney pursuant to Title 28, United States Code, Section 1826. A Petition for Rehearing and Suggestion for Hearing En Banc was denied.

Jurisdiction to review the decision of the Court of Appeals is conferred upon this Court by Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ***nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, *and to have the Assistance of Counsel for his defense*."

STATEMENT OF THE CASE

Introduction

This case involves whether or not the attorney for the Petitioner should be required to appear before a Federal Grand Jury, testify to conversations he had with the Petitioner within the attorney-client privilege and produce documents within the work product doctrine as to the Petitioner. Further this case concerns the procedure to be utilized in making the determination and the procedure to be applied if an attorney is required to testify against his client before a Federal Grand Jury.

Attorney B was subpoenaed to appear, testify and produce documents before the Federal Grand Jury for the Southern District of California.

In order to comply with the subpoena Attorney B would be required to disclose conversations he had with his client, the Petitioner, which were deemed privileged within the attorney-client privilege and the work product doctrine as it relates to the Petitioner.

The Petitioner requested that all applicable privileges be asserted on his behalf including the attorney-client privilege and the work product doctrine.

Attorney B appeared before the Federal Grand Jury and asserted the attorney-client privilege, work product doctrine and the ABA Rules of Professional Responsibility. He was subsequently ordered to respond to the subpoena by the trial court, respectfully refused, and found in contempt pursuant to Title 28, United States Code, Section 1826.

A timely notice of appeal was filed by the Petitioner.

The Court of Appeals for the Ninth Circuit affirmed the decision and denied a Petition for Rehearing and Suggestion for Hearing En Banc.

Facts

The law firm of Attorney B was retained to represent Telink, Inc. in pending civil litigation. In April of 1982 Attorney B joined the law firm and began work on the civil litigation concerning Telink, Inc.

Attorney B during the course of the representation of Telink, Inc. interviewed officers and employees concerning the civil litigation. At one point in time there was a lawsuit in Superior Court and a lawsuit in United States District Court for the Central District of California.

In October of 1982 search warrants were executed by representatives of the San Diego County District Attorney's Office on Telink, Inc., the residence of the Petitioner, and others. On the following day, Mr. Peter J. Hughes, Esq. was retained to represent Telink, Inc. and its officers and employees regarding the investigation being conducted by the District Attorney's Office of the County of San Diego. This included the Petitioner.

Mr. Hughes continued to represent the Petitioner until the latter part of November of 1982 when the Petitioner retained Mr. John A. Mitchell, Esq. to represent him in the pending criminal investigation.

The Petitioner continued to be represented by Attorney B and his law firm in the civil litigation until he retained another attorney, Mr. Gary Bostwick, Esq., in June of 1983.

Following the retention of Mr. Mitchell by the Petitioner, Attorney B contacted Mr. Mitchell and requested permission to have the Petitioner continue to assist him in the pending civil litigation and proposed litigation regarding the County of San Diego and Telink, Inc. Attorney B was informed that he could talk to the Petitioner as long as the conversations were within the attorney-client privilege as it related to a civil case, the attorney-client privilege as it related to the joint defense of a potential criminal case and the work product doctrine. In light of this conversation Petitioner was informed that he could talk to Attorney B.

Similar discussions were had with Mr. Hughes who was representing Telink, Inc. in the criminal investigation and similar agreements were reached as those set forth as to Attorney B. Additionally, it was agreed that the Petitioner would fall within the attorney-client privilege available to Telink, Inc.

Subsequent to Mr. Mitchell being retained by the Petitioner, Attorney B requested from Mr. Mitchell that in addition to being allowed to talk to the Petitioner, that he be allowed to prepare affidavits and/or declarations for the signature of the Petitioner. This permission was not granted. Attorney B also indicated to Mr. Mitchell that the deposition of the Petitioner was required in the pending civil litigation. Permission was not granted by Mr. Mitchell.

Telink, Inc. had entered into a contract with the County of San Diego regarding the purchase of a telecommunications system in June of 1982.

Following the execution of the search warrants referred to above the affidavit was made public after a hearing in Superior Court for the County of San Diego on December 13, 1982. Mr. Mitchell represented the Petitioner at that hearing.

Once the affidavit had been made public the County of San Diego cancelled the contract they had entered into with Telink, Inc.

Attorney B wrote two letters to the County of San Diego regarding this cancellation and subsequently filed a claim with the County of San Diego on or about January 24, 1983, which included as attachments the two letters which were dated December 10, 1982, and January 3, 1983.

The information contained in the letters was obtained from the Petitioner and other employees and officers of Telink, Inc.

The Government served a subpoena duces tecum on Attorney B ordering him to appear, testify and produce documents concerning the following:

> "1. All writings, original and duplicate, pertaining to investigation conducted by or for Attorney ------ - B---- concerning:
>
> 1. The relationship between Telink and Abe Stein;

2. The relationship between Telink and TDC and its principals;
3. The relationship between Telink and Hillario "Larry" Gonzales;
4. The relationship between Telink and Robert Dillon;

including but not limited to reports, notes, memoranda and correspondence."

"2. All writings, original and duplicate, pertaining to communications concerning the Telink-San Diego County contractual dispute, between Attorney ------ - B----and:
1. Bobby Hendrix;
2. John Bostwick;
3. James Linder;
4. any person acting on behalf of Telink, its owners, officers and agents;

including but not limited to reports, notes and memoranda and correspondence."

Attorney B was instructed by the Petitioner to assert the attorney-client privilege and work product doctrine as it related to his appearance, testimony and document production in compliance with the subpoena.

Attorney B has appeared before the Federal Grand Jury and asserted the attorney-client privilege, work product doctrine and the ABA Rules of Professional Conduct as the reasons for respectfully refusing to comply with the subpoena.

A hearing was held and then a briefing schedule and further hearing.

The Government contends that the filing of the claim and the attached letters is a waiver of any attorney-client privilege and work product doctrine that may relate to the Petitioner.

The Government further contended that the attorney-client privilege and work product doctrine was not applicable to the Petitioner because of the criminality exception. In other words, the Petitioner and others had used Attorney B to commit a fraud on the County of San Diego in the settlement of a civil controversy.

The trial court ordered Attorney B to respond to the subpoena. Again Attorney B declined to answer the questions posed and the trial court

found Attorney B in contempt pursuant to Title 28, United States Code, Section 1826. Attorney B filed a notice of appeal as did the Petitioner and an officer of Telink, Inc. Attorney B was released on his own recognizance following a determination by the trial court that the appeal was not frivilous or taken for the purpose of delay.

The trial court found that Attorney B had waived the attorney-client privilege and work product doctrine as to the Petitioner in the following language:

> "(11) Any confidentiality which existed with respect to communications between B---- and Telink, Inc., Hendrix, Linder and Bostwick concerning the Telink-San Diego County dispute were waived by B------ public dissimenation of summaries thereof, and the public filing and release to the media of said communications."
>
> "(12) B------ actions in this regard were intended to further the business purposes of Telink in its dispute with the County of San Diego and were not consistent with the confidentiality of attorney-client communications and were not privileged as such."

The trial court further found that Attorney B had been utilized by the Petitioner and others to commit a fraud on the County of San Diego in the following language:

> "(13) The government has demonstrated by affidavit that the communications which were sought by the grand jury were communications in furtherance of the perpetration of a crime or fraud upon the County of San Diego, by Telink, Inc., Hendrix, Linder, Bostwick and others. A reading of the government affidavit, even without reference to information learned from John Bostwick, a cooperating government witness and former Telink employee, establishes the requisite prima facia showing of crime or fraud and B------ communications with the county in furtherance of that crime or fraud. The statements of Bostwick when considered along with the balance of the affidavit provide compelling evidence of criminal conduct of said persons."

REASONS FOR GRANTING THE WRIT

Introduction

The fundamental issue of the sanctity of conversations between an attorney and his client and work product derived from the attorney-client privilege is presented for consideration.

At no stage in the proceedings have the Courts addressed directly the issues presented on behalf of the Petitioner. Rather the determinations have been made on a conclusionary basis without a specific determination of crucial issues raised by the Petitioner.

It is respectfully suggested that this Court should address the substantive and procedural issues raised by the Petitioner as it relates to his relationship with his attorney and whether or not that relationship can be violated in the broadest terms by a simple statement of waiver and criminality as to the attorney-client privilege and the work product doctrine and without any procedural guidelines concerning the Petitioner.

It is fundamental that under the Fifth and Sixth Amendments to the United States Constitution that the Petitioner is entitled to an attorney of his choice and that his conversations with his attorney are privileged as is the work product doctrine.[1]

It is respectfully suggested that this case presents for consideration the determination by this Court the applicable procedural and substantive rules to be applied when a determination is to be made as to whether or not the attorney-client privilege and/or the work product doctrine can be invaded by the Federal Grand Jury in the conduct of a criminal investigation.

For the reasons that follow it is respectfully suggested that the Petition should be granted.

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[1] See: Federal Rules of Evidence, Rule 501.

I.

The Trial Court Prior To Ruling On The Applicability Of The Attorney-Client Privilege And/Or The Work Product Doctrine Should Be Required To Determine If The Government Had Already Improperly Invaded The Attorney-Client Privilege And/Or The Work Product Doctrine.

At the outset it must be pointed out that there was no showing by the Government that they have not already violated the attorney-client privilege and the work product doctrine as it relates to Petitioner in the interviews of Mr. John Bostwick. In fact the opposite may be presumed from the affidavit filed with the trial court. Obviously the allegations made in large part come from Mr. John Bostwick. No chronology is presented as to his interviews in order to determine whether or not the attorney-client privilege and the work product doctrine have already been improperly violated by the Government in this investigation. This can only be determined by the review of the interviews and/or testimony of Mr. John Bostwick in order to determine whether or not there has already been an improper intrusion into the attorney-client privilege and the work product doctrine as it relates to the Petitioner without a ruling by this or any other Court.

The Government seemed to admit this possibility when they cited *United States v. Melvin* (5th Cir. 1981) 650 F.2d 641 which indicates that such an improper intrusion would give rise to suppression. In fact the Government went further and indicated that no automatic prejudice is assumed by its disclosure thus indicating that there may have been improper disclosure prior to the subpoena being served on Attorney B. *United States v. Morrison* (1981) 449 U.S. 361; *United States v. Irwin* (9th Cir. 1980) 612 F.2d 1182.

It is the position of the Petitioner that there may already have been an improper invasion of his attorney-client privilege and the work product doctrine and the Government was attempting to have the Court resolve that problem by requesting compliance by Attorney B with the subpoena.

The only way to determine if the foregoing analysis is applicable to this case would be for this Court to order a hearing prior to a consideration of the pending matters in order to determine the chronology of events that resulted in the issuance of the subpoena. This hearing would require

at a bare minimum a showing by the Government that they have *not* already invaded the attorney-client privilege of the Petitioner and the work product doctrine as it applies to the Petitioner.

In short, was the Court being asked to affirm an Order which will validate a possible improper prior invasion of the attorney-client privilege and the work product doctrine as it relates to the Petitioner.

By way of analogy if there had been an illegal wire tap or illegal surveillance involved or an improper person in the Grand Jury room in the proceedings before the Federal Grand Jury the witness should have "just cause" within Title 28, United States Code, Section 1826 for refusing to answer. *Gelbard v. United States* (1972) 408 U.S. 41; *In re Grand Jury Proceedings* (D.C. Cir. 1979) 613 F.2d 1171; *In re Boscaglia* (2d Cir. 1975) 518 F.2d 77; *In re Perscio* (2d Cir. 1974) 491 F.2d 1156; *In re Grand Jury Investigation* (D.C. Pa. 1976) 424 F.Supp. 802; *United States v. DiGirlomo* (D.C. Mo. 1975) 393 F.Supp. 997.

II.

The Trial Court Should Require More Than An Affidavit Replete With Hearsay And Other Inadmissible Evidence In Determining That The Attorney-Client Privilege And The Work Product Doctrine Is Not Applicable.

The record clearly indicates that the Petitioner was represented by Attorney B in pending civil litigation and the San Diego County dispute in December of 1982 through June of 1983. The Petitioner had an attorney-client privilege with Attorney B and the work product doctrine was applicable.

The record also indicates that the Petitioner was represented by Mr. Mitchell in the criminal investigation beginning in the latter part of November of 1982. The attorney-client privilege and work product doctrine would again be applicable.

The record further indicates that the only conversations that Attorney B was allowed to have with the Petitioner following Mr. Mitchell being retained was within the privilege that Attorney B had in the civil litigation and San Diego County dispute and also under any corporate privilege which may be applicable *and* a joint defense privilege as it relates to the

defense of a criminal case. *Hunydee v. United States* (9th Cir. 1965) 365 F.2d 183.

The work product doctrine would be equally applicable in each situation.

The trial court allowed the Government to attack this fundamental privilege based upon an affidavit which is primarily hearsay without benefit of the opportunity to cross-examine the affiant, though requested. Though the authority seems to indicate that the affidavit procedure is appropriate no case can be found where in a situation similar to this unique case counsel for the client has been denied the opportunity to cross-examine the affiant, a special deputy United States Marshall, in order to determine the validity of the information contained in the affidavit.

It is respectfully suggested that the Petitioner should have been afforded this opportunity prior to the time a determination was made, that his attorney from early 1982 until June of 1983 will be required to appear and testify before the Federal Grand Jury, as to their conversations and produce work product which had been developed as a result of their conversations.

This conclusion is particularly applicable when the conversations the Government is attempting to elicit from Attorney B were within the joint defense privilege asserted by the Petitioner's counsel in the criminal investigation.

But here we go one step further in our analysis of the affidavit if it is to be accepted without the scrutiny of cross-examination. The affidavit is replete with statements which would not be admissible under the Federal Rules of Evidence. The affidavit presented contains hearsay, double hearsay, conclusions and alleged conversations without sufficient foundation.

It is respectfully requested that the trial court should have excluded all portions of the affidavit which would be excluded under the Federal Rules of Evidence. In that regard it is respectfully suggested that the affidavit is hearsay. Going to the substance of the affidavit the following specific objections are presented without waiving objections to other portions of the affidavit:

4. Hearsay, conclusion, no foundation.
5. Hearsay, conclusion, no foundation.
6. Hearsay, conclusion, no foundation.
8. Hearsay, conclusion, no foundation.
9. Hearsay, conclusion, no foundation.
13. Hearsay, conclusion, no foundation.
15. Hearsay, conclusion, no foundation.
23. Hearsay, conclusion, no foundation.
24. Hearsay, conclusion, no foundation.
25. Hearsay.
27. Hearsay, conclusion, no foundation.
29. Hearsay, conclusion, no foundation.
30. Hearsay, conclusion, no foundation.
32. Hearsay, no foundation.
34. Hearsay, speculation.
37. Hearsay, conclusion, no foundation.
39. Hearsay, conclusion, no foundation.
40. Hearsay, conclusion, no foundation.
41. Conclusion.
43. Conclusion.

It is respectfully suggested that those specific portions of the affidavit referred to above should not have been considered by the trial court and therefore the appropriate showing was not made by the Government.

The trial court should not have considered an affidavit alone in determining the issues presented. The Petitioner should have been afforded the opportunity of cross-examining the affiant and Mr. John Bostwick, the Government informant. These minimum safeguards should exist when we are dealing with the attorney-client privilege and the work product doctrine.

III.

The Determination Of The Trial Court As To The Application Of The Doctrine Of Waiver Was Contrary To Law.

The trial court found as follows:

> "(11) Any confidentiality which existed with respect to communications between B---- and Telink, Inc., Hendrix, Linder and Bostwick concerning the Telink-San Diego County dispute were waived by B----- public dissimenation of summaries thereof, and the public filing and release to the media of said communications."

> "(12) B----- actions in this regard were intended to further the business purposes of Telink in its dispute with the County of San Diego and were not consistent with the confidentiality of attorney-client communications and were not privileged as such."

In substance the trial court has said that Attorney B has waived the attorney-client privilege and work product doctrine by filing the claim with the County of San Diego, by dissimenation to the public. Then the trial court makes the finding that Attorney B was taking an action on behalf of the business purpose of Telink, Inc. and not consistent with the attorney-client privilege.

It is respectfully suggested that the conclusion of the Court may be consistent with a waiver as to the matters contained in the documents. But it does not follow that the publication of a writing on behalf of a corporation leads to the conclusion that all privileged conversations are waived along with the work product doctrine.

It is respectfully suggested that Attorney B could not and did not waive the atttorney-client privilege or the work product doctrine as to the Petitioner by publishing the claim on behalf of his corporate client. The acts of Attorney B in this regard should not now allow the Government to inquire into conversations with the Petitioner. This is particularly applicable since Attorney B was only allowed to talk to the Petitioner within the joint defense privilege previously discussed.

The Government contended that the filing of the claim with its attachments with the County of San Diego was a waiver by Attorney B of the attorney-client privilege and the work product doctrine. It is respectfully suggested that under the doctrine of *Upjohn v. United States* (1981) 449 U.S. 381, *Diversified Industries Inc. v. Meredith* (8th Cir. 1977) 572 F.2d 596 and *Sylgab Steel and Wire Corp. v. Imoco Gateway Corp.* (N.D. Ill. 1974) 62 F.R.D. 454, Attorney B did not and could not waive the attorney-client privilege of the Petitioner or the applicable work product doctrine.

If we follow the logic of the Government to its ultimate conclusion this would mean that any attorney filing a claim with the County of San Diego would be waiving the attorney-client privilege and the work product doctrine as to the claim required to be filed by law.

Section 313 of the California Code of Civil Procedure is the basis for filing a claim against the County of San Diego. The statutory scheme for filing claims against a public entity such as the County of San Diego is set forth in detail in Section 910, *et seq.* of the Government Code of the State of California.

As can be seen from an analysis of the statutory scheme the requirements are mandatory and not permissive. There is no indication in the statutory scheme that indicates that the filing of the claim with the County of San Diego would give rise to the waiver of the attorney-client privilege or the work product doctrine as it relates to the Petitioner. This is of more significance when we consider that in this situation we are talking about the attorney-client privilege and the work product doctrine as it relates to a criminal investigation.

Attorney B could not waive any conversations that may have taken place regarding matters which he as an attorney chose to include in the claim or work product produced in order to file the claim.

The Government relied on two *civil* cases regarding issues relating to discovery in order to sustain its position.

The first case is *Transamerica Computer v. I.B.M.* (9th Cir. 1979) 573 F.2d 641. There the issue related to documents and not to the presentation of documents giving rise to a waiver of conversations that the attorney had with the client relating to those conversations. In *Duplan Corporation v. Deering Milliken, Inc.* (D.C. S.C. 1975) 397 F.Supp.

1146, the Court was dealing with complex patent litigation. That case related to the voluntary waiver by a client without limitations of documents passing from client to the attorney. However a close reading of that case shows that it relates to documents and not waiver as to conversations the attorney may have had with the client within the attorney-client privilege or the work product doctrine. Waiver of conversations only occurred when the client had previously testified as to at least part of the documents in question.

It should be noted that the authority cited by the Government regarding waiver predates the decision in *Upjohn v. United States, supra*, which rejected a waiver contention in facts similar to this case.

It is respectfully suggested that Attorney B did not and could not waive the attorney-client privilege of the Petitioner or the work product doctrine as it relates to the Petitioner.

Assuming *arguendo* there was waiver, it does not go beyond the matters contained in the claim filed with the County of San Diego and should not allow the Government to require Attorney B to appear, testify and produce documents before the Federal Grand Jury in a criminal investigation.

IV.

The Determination Of The Trial Court As To The Applicability Of The Doctrine Of Criminality Was Contrary To Law.

As previously indicated the failure to allow cross-examination of the affiant, and John Bostwick the informant, the inadmissible contents of the affidavit are a sufficient basis for overturning the determination of the trial court under *United States v. Hodge and Zweig* (9th Cir. 1977) 548 F.2d 1347.

The trial court found that the affidavit without the information which came directly from Mr. John Bostwick was sufficient as to the Petitioner. It is respectfully suggested that a cursory analysis of the affidavit refutes this contention.

A review of the affidavit would require that the trial court exclude paragraphs 13, 23 (beginning at line 16), 24, 25, 27, 28, 29, 30, 31, 36, 37,

38, 39, and 40 (beginning at line 20). When these paragraphs are excluded there is *no* showing as to the Petitioner. Therefore the conclusion of the trial court in this regard was erroneous.

Assuming *arguendo* that this Court is going to consider the affidavit in its present form in order to determine the criminality of the Petitioner then an analysis of that affidavit must be considered.

Paragraph 23 of the affidavit makes reference to a meeting that took place at some unspecified location, at some time in December of 1982. According to John Bostwick one of the subjects discussed was how to handle Telink, Inc.'s payments of money to Sage. A corporation officer, the Petitioner and Bostwick were concerned that a $66,667.00 check had been given to Sage to "launder" in order to obtain non-traceable currency relating to *another* governmental contract. Additionally there was a discussion concerning the PCMA transaction and payments to Sage concerning fictitious promissory notes. All of the discussions in this paragraph relate to what John Bostwick did and are conclusionary as to any statement actually made by the Petitioner. At the worst this discussion can be interpreted as a discussion where John Bostwick was discussing another governmental contract and payments by Telink, Inc. for equipment from TDC.

There is no indication that the Petitioner, who was not a corporate officer, had prior knowledge of the payments to Sage by Telink, Inc. or that the Petitioner was involved in the purchase of equipment by Telink, Inc. from TDC. Obviously the Petitioner would have been concerned but standing alone this paragraph does not indicate that the Petitioner provided false information to Attorney B relating to the San Diego contractual dispute.

Paragraph 27 states that Mr. John Bostwick said that he, another corporate officer and the Petitioner met at various times with Telink, Inc.'s attorneys and provided them with false information which was included in the claim made with the County of San Diego. This statement is at best conclusionary as to the Petitioner. What false information? What attorneys? Where and when did the conversations take place? Who was present? What did the Petitioner say? Again this allegation falls short of the necessary showing as to the Petitioner.

Paragraph 29 is similar to paragraph 27 and raises the same questions with the same conclusion.

In paragraph 30 the allegation is made that included in the claims were two false promissory notes purportedly signed by Sage to cover loans from John Bostwick. The only reference to the Petitioner is that "Bostwick advised me that they were created in December, 1982, by he and Sage after discussions with a corporate officer and the Petitioner." If we assume the accuracy of this statement we still have the same analysis as previously set forth as to paragraph 27.

Paragraph 32 is interesting. Robert Dillon, another cooperating witness and former employee of the County of San Diego said that the Petitioner *and* Stein asked him to obtain a prostitute for Gonzales. Dillon, then a TDC employee, said he could not locate a prostitute at the Town and Country Motel during the middle of a convention in September, 1981. The Petitioner then allegedly told Dillon to go to a room that had been rented by Telink, Inc. and that a girl would be there. Dillon said either the Petitioner or Stein gave him $100.00. Dillon escorted Gonzales to Room 3877, gave the girl $100.00 and left Gonzales with her.

Paragraph 32 is internally inconsistent. If the Petitioner had a room and a girl in the room why would he send Mr. Dillon searching for a girl for Gonzales. Dillon indicated that he could not find a girl at the Town and Country for Gonzales during the middle of a convention in September of 1981. These allegations are not only inconsistent but absurd.

But assuming that the Petitioner had Mr. Dillon, then a TDC employee, who was a consultant with the County of San Diego, provide Gonzales, a San Diego County employee, with a $100.00 girl, this act by the Appellant does not in and of itself add up to the standards of *United States v. Hodge and Zweig, supra*. In short the providing of a $100.00 prostitute to Gonzales on one occasion by the Petitioner through Dillon for Gonzales at a Communication Convention in Mission Valley did not meet the test which should give rise to the trial court entering an Order regarding the attorney-client privilege and the work product doctrine.

In paragraph 37, Mr. John Bostwick stated that he met in February of 1983 with the Petitioner, and another corporate officer and *Mr. Bostwick* prepared a detailed financial accounting of all the payments to TDC. The contract had been awarded in June of 1982. In December of 1982 and January of 1983 Attorney B wrote to County Counsel for San Diego. On January 12, 1983, the County cancelled the contract. On

January 24, 1983, Attorney B filed the claim on behalf of Telink, Inc. which appears to be the basis of the alleged fraud. Assuming the compilation of Mr. John Bostwick in some way relates to criminality, and further assuming that the Petitioner was in some way involved in the compilation this event took place following the December, 1982, and January, 1983, letters and claim which are the subject of the subpoena.

Even if the compilation of Mr. John Bostwick took place while the Petitioner was present this in no way adds to the showing which was required by the Government.

Paragraph 39 does not relate to the Petitioner in that a careful reading shows that Mr. John Bostwick is referring to a conversation he allegedly had with Mr. George Bracken.

Probably the most interesting factual analysis regarding the Petitioner appears in paragraphs 40 through 43, inclusive. In paragraph 40, the Petitioner is promoted to a Vice President. It is alleged without factual basis that the Petitioner has been retained as a consultant by Burnup. It is alleged that Burnup has agreed to pay attorney fees for the Petitioner though whether or not this involves the civil cases pending or the criminal investigation is not clear.

Next in paragraph 41 as to the Petitioner the bald assertion is made that Burnup has agreed to pay the Petitioner several hundred thousand dollars and he has declined to cooperate in any way and has indicated his desire to claim the protection of the Fifth Amendment. This allegation highlights the allegations made in this affidavit concerning the Petitioner. In short, the Government would have the Court believe that the Petitioner has refused to cooperate and asserted his Fifth Amendment rights because Burnup allegedly entered into a consulting agreement with him and agreed to pay his attorney fees. This allegation is improper and highly prejudicial as it relates to the matters before the Court. It assumes that the Petitioner is guilty of a crime, it assumes that the Petitioner's assertion of a Fifth Amendment right is improper and it assumes that the Petitioner and his counsel have been paid to protect Burnup. This is nonsense!

But in paragraph 43 the Government goes one step further. They state:

> ". . . Moreover, it would appear that the requisite prima facie showing has been made that Burnup in paying large sums of money to a corporate officer and the Appellant is attempting to obstruct the grand jury's access to information which would otherwise be available to it. Factual information conveyed to Caporella and any other members of Burnup management, whether conveyed by attorneys honestly providing legal assistance without knowledge of all facts and circumstances indicating Burnup and Caporella's involvement in criminality is critical to a determination of whether the payments of large sums of money to those involved in Telink, Inc. constitute an attempt to obstruct justice in violation of 18 U.S.C. § 1503." p. 26, lines 6-17.

This conclusionary statement is one which is obviously intended to attack not only the Petitioner but also his counsel as it relates to an allegation of obstruction of justice. This allegation had no place before the trial court. It had absolutely nothing to do with the subpoena served on Attorney B as it relates to the Petitioner and the Telink-San Diego County contractual dispute.

It was of particular significance that the trial court did not allow the cross-examination of the affiant regarding the bald assertions and conclusions drawn in paragraphs 40 - 43 inclusive. This attack should not have been allowed to stand by the trial court. Either the Government should have proved these allegations or in the alternative the trial court should have striken paragraphs 40 - 43 inclusive as they relate to the Petitioner.

An overview of the affidavit indicates that the Petitioner has been in charge of marketing for Telink, Inc. Though the affidavit does not provide this information the Memorandum of the Government indicates that the Petitioner was a marketing representative for Telink, Inc. from early 1981 through the Spring of 1983 and the principal Telink, Inc. representative regarding the San Diego County contract.

It is clear from the affidavit that the Petitioner was not involved in the financial affairs of Telink, Inc. and that he was not in a policy making position.

If the affidavit as analyzed above is carefully considered as to the Petitioner this Court must reach the conclusion that the Government has not met the test of *United States v. Hodge and Zweig, supra.* There was not an appropriate showing in the affidavit as to the Petitioner sufficient for the trial court to Order Attorney B to answer questions regarding conversations he had with the Petitioner within the attorney-client privileges set forth above and to abrogate the work product doctrine previously discussed. The Government did not make the required showing a to the Petitioner.

When this Court reviews the affidavit it is respectfully suggested that as to the Petitioner, the Government failed to make the required showing of criminality within the doctrine of *United States v. Hodge and Zweig, supra.*

V.

The Trial Court Should Be Required To Make A Factual Determination As To The Petitioner When Making A Determination That The Attorney-Client Privilege And The Work Product Doctrine Were Not Applicable.

The Petitioner is in a position different than the other parties in this appeal.

Attorney B and his law firm represented the Petitioner from early 1982 until June of 1983 in the pending civil litigation and the San Diego County dispute.

Mr. Peter J. Hughes, Esq. represented the Petitioner from the latter part of October until the latter part of November of 1982 in the pending criminal investigation.

Mr. Mitchell represented the Petitioner from the latter part of November of 1982 until the present in the criminal investigation.

Following the representation of the Petitioner by Mr. Mitchell, Attorney B was only allowed to talk to the Petitioner because it was agreed that there would be a corporate attorney-client privilege, a civil litigation attorney-client privilege and an attorney-client privilege as to the joint defense of individuals and entities being investigated for alleged

criminal conduct. Additionally, the work product doctrine was applicable in each instance.

The facts are unique as to the Petitioner. Attorney B as to any conversation with the Petitioner is in the same position as if the conversation had been with Mr. Mitchell. For this reason under the joint defense doctrine of *Hunydee v. United States, supra*, in order for the attorney-client privilege to be pierced it must be pierced not only as to Attorney B but also as to Mr. Mitchell. When talking to Attorney B the Petitioner is also talking to Mr. Mitchell when the joint defense doctrine is considered. Attorney B cannot by himself take any action which would violate the joint defense privilege.

Put another way, if Attorney B had attended a meeting of counsel and clients regarding the criminal investigation representing the corporate entity and its officers and employees and a joint criminal defense privilege was established by those present, matters discussed at that meeting would be privileged within *Hunydee v. United States, supra*. Attorney B could not waive the privilege or cause the privilege to be invaded by subsequent actions he might take in filing a claim with the County of San Diego.

If Attorney B did in fact cause the privilege to be invaded it is respectfully suggested that it would only be to the extent of the material contained in the claim or letters that he wrote but not as to the source of the information he utilized or the specific conversation or conversations he may have had with the Petitioner.

For this additional reason it is respectfully suggested that the Order was improper as to the Petitioner.

VI.

When There Are Multiple Clients Involved The Trial Court Should Be Required To Make A Preliminary Determination As To Whether Or Not The Attorney Involved Has An Independent Recollection Of Conversations That He Had With The Petitioner.

It is respectfully requested that a determination be made as to whether or not Attorney B can at this date distinguish between the individuals with whom he had conversations.

The questions asked before the Federal Grand Jury by counsel for the Government were extremely broad in nature and did not deliniate the time and place of any particular conversation, who was present at a particular conversation and what was said by a particular individual during a conversation.

The problem presented is whether or not Attorney B can now lay the appropriate foundation as it relates to the individual or individuals that he may have had conversations with in response to questions that may be posed by counsel for the Government. Certain matters may be attributed inadvertently to one individual when in fact another individual may have made the statement.

In short it is respectfully requested that the trial court should enter an Order in this unique situation requiring counsel for the Government to lay the proper foundation in order that the individual making a particular statement be properly identified.

If counsel for the Government cannot lay the proper foundation then it is respectfully suggested that Attorney B not be required to answer general questions regarding conversations where individuals may be improperly joined together in a generalized statement concerning a particular topic or topics.

The improper joinder could prejudice a particular individual in the mind of the Federal Grand Jury when Attorney B may have no specific recollection as to what was in actuality stated by that individual.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JOHN A. MITCHELL

Attorney for James L. Linder

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 23 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

IN RE GRAND JURY PROCEEDINGS RECALCITRANT WITNESS.	
ROBERT BAKER, et al.,	Nos. 84-5863/5866
Appellants,	DC# GJ 83-94-GT
vs.	Southern California
UNITED STATES OF AMERICA,	
Appellee.	MEMORANDUM

Appeal from the United States District Court
for the Southern District of California
Hon. Gordon Thompson, U.S. District Judge, Presiding
Submitted May 18, 1984

Before: CHOY, GOODWIN and PREGERSON, Circuit Judges

Attorney Robert Baker appeals the district court's order which found him in contempt pursuant to 18 U.S.C. § 1826 (recalcitrant witness) for refusing to produce writings and recount conversations before a grand jury. Baker asserted attorney-client privilege and work product doctrine as justification for his refusal.

Baker's voluntary public dissemination of summaries of his investigation into alleged improprieties on the part of Telink, Inc.'s officers in a contract dispute with San Diego county waived both privileges. Moreover, even if the privilege was not waived, the Government has proffered sufficient evidence to establish that Baker's service was secured in furtherance of a continuing fraud upon the county, which excepts those communications from either privilege.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 21 1984
PHILLIP B. WINDERRY
CLERK U.S. COURT OF APPEALS

IN RE GRAND JURY PROCEEDING RECALCITRANT WITNESS.	
ROBERT P. BAKER, et al.,	No. 84-5863/66
Witnesses-Appellants,	DC# GJ-83-94-GT
vs.	Southern California
UNITED STATES OF AMERICA,	
Appellee.	ORDER

Before: CHOY, GOODWIN and PREGERSON, Circuit Judges

Appellants' petition for rehearing with a suggestion for rehearing en banc is denied.

Supreme Court, U.S.
FILED
DEC 28 1984
ALEXANDER L. STEVAS
CLERK

No. 84-67

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES L. LINDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-67

JAMES L. LINDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner intervened in these contempt proceedings against an attorney who had been subpoenaed to testify and produce documents before a grand jury in the Southern District of California. Petitioner contended that the attorney's testimony and production of documents would violate the attorney-client and work-product privileges.

1. The grand jury was investigating allegations of fraud and the payment of kickbacks in connection with the award by San Diego County to Telink, Inc., of a $24.5 million contract for the installation of a new telephone system. Petitioner was the director of marketing for Telink.

The briefs and record in this case were submitted to the court of appeals under seal, and we therefore shall not cite to the record. However, after the certiorari petition was filed, an indictment was returned against petitioner and others, charging racketeering, conspiracy, and mail fraud. The indictment describes in detail the allegations of fraud

and kickbacks concerning the San Diego contract. Indictment at 38-55, 56-61.[1] The contract was cancelled by the County after the allegations of fraud were made public. A legal dispute then arose between Telink and the County concerning the cancellation, but that dispute was settled on May 6, 1983, when the County agreed to pay Telink $2.4 million, plus an additional amount of up to $500,000 in equipment restocking charges, in return for Telink's dropping of its $57 million claim against the County. Petitioner and others are charged in the pending indictment with, inter alia, having caused Telink's attorney to submit false and fraudulent documentation to the County Board of Supervisors in connection with the dispute, thereby fraudulently inducing the County to settle. Indictment at 56-61.

The subpoena issued to Telink's attorney during the grand jury investigation directed him to produce certain documents pertaining to communications between the attorney and petitioner and others affiliated with Telink that related to the contract dispute with San Diego County. See Pet. 5-6. Petitioner contended that he had an attorney-client relationship with the attorney and that disclosure of the information covered by the subpoena would violate the attorney-client and work-product privileges. The government contended that those privileges had been waived by virtue of public disclosures made in letters sent by the attorney to the County and that the crime-or-fraud exception to the privileges applied.

The district court ordered the attorney to testify, and held him in contempt pursuant to 28 U.S.C. 1826 when he refused to do so. The court of appeals affirmed the order of contempt in a brief memorandum opinion. It held that the attorney's voluntary public dissemination of summaries of his investigation into alleged improprieties on the part of

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[1]We have lodged a copy of the indictment with the Clerk of the Court.

Telink officials constituted a waiver of the privileges and that, in any event, the government had produced sufficient evidence to establish that the attorney's services were secured in furtherance of a continuing fraud upon the County, and therefore fell within the crime-or-fraud exception to the privileges (Pet. App. A1).

2. Petitioner filed the instant petition for a writ of certiorari seeking review of the court of appeals' holding. However, we have been informed by the United States Attorney's Office that after the court of appeals rendered its decision and petitioner failed to obtain a stay, the attorney complied with the subpoena. Moreover, as noted above, an indictment has now been returned by the grand jury. As a result, there no longer is a live controversy concerning the application of the attorney-client and work-product privileges — or any questions concerning waiver or the crime-or-fraud exception — as regards the attorney's appearance before the grand jury.

It is conceivable that the question of privilege could arise again at trial. But if the attorney actually is called to testify at trial, it would seem that the return of the indictment charging that the attorney's services were secured in furtherance of a continuing fraud upon the County would itself be sufficient to invoke the crime-or-fraud exception to the attorney-client privilege recognized by this Court in *Clark* v. *United States*, 289 U.S. 1, 15 (1933), and presumably to invoke the identical exception to the work-product privilege as well.[2] See *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19

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[2]Contrary to petitioner's contention (Pet. 10-12), it plainly was appropriate for the district court, prior to the return of the indictment, to rely on the detailed affidavit submitted by the government to establish the prima facie showing necessary for application of the crime-or-fraud exception. A mini-trial on that issue was not required. See, *e.g.*, *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1028-1029 (5th Cir. 1982) (en banc); *In re Sealed Case*, 676 F.2d 793, 814-815 (D.C. Cir. 1982); *In re John Doe Corp.*, 675 F.2d 482, 489-491 (2d Cir. 1982).

(1975). However, any question of privilege that might arise at trial of course is not presented in the instant certiorari petition. But even if it were, it would be presented in an interlocutory posture. If the attorney testifies at trial and if petitioner is convicted, petitioner may raise his privilege claim and any other issues in an appeal of his conviction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12